

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

UNITED STATES OF AMERICA,
Plaintiff,

v.

JESSY SALVADOR AVILA,
Defendant.

Case No. 2:18-cr-00188-RFB-CWH-1

ORDER

Defendant Jessy Salvador Avila moves the Court to vacate, set aside, or correct his sentence (ECF No. 38) on the basis that his conviction for use of a firearm during and in relation to “a crime of violence” (specifically, carjacking) in violation of 18 U.S.C. § 924(c)(1)(A) is no longer valid because carjacking categorically fails to qualify as a “crime of violence” under 18 U.S.C. § 924(c). For the reasons below, his motion is denied.

I. FACTUAL AND PROCEEDURAL BACKGROUND

On September 4, 2018, Mr. Avila pleaded guilty to (Count 1) Felon in Possession of Ammunition, (Count 2) Carjacking, and (Count 3) Possession of a Firearm in Furtherance of a Crime of Violence. ECF No. 30, 33. On December 6, 2018, the Court sentenced Mr. Avila to zero months of incarceration on Counts 1 and 2, but imposed 60 months of incarceration for Count 3. ECF No. 33. The Court also sentenced Mr. Avila to supervised release for five years on Count 3. Id.

Following the Supreme Court’s decision in United States v. Davis, 139 S. Ct. 2319 (2019) (holding the § 924(c) residual clause is unconstitutionally vague), on June 23, 2020, Mr. Avila

1 timely filed a 28 U.S.C. § 2255 Supplemental Motion to Vacate, Set Aside, or Correct Sentence
 2 relying on Davis. ECF No. 38. The Motion was fully briefed on September 15, 2020. ECF Nos.
 3 40, 41. A hearing on the motion was set for May 19, 2021. The Court vacated the hearing to allow
 4 resolution of appeals pending before the Ninth Circuit which addressed the question in the motion.

5 6 **II. LEGAL STANDARD**

7 Under 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which imposed
 8 sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion may be
 9 brought on the following grounds: “(1) the sentence was imposed in violation of the Constitution
 10 or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the
 11 sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject
 12 to collateral attack.” Id.; see United States v. Berry, 624 F.3d 1031, 1038 (9th Cir. 2010). When a
 13 petitioner seeks relief pursuant to a right newly recognized by a decision of the United States
 14 Supreme Court, a one-year statute of limitations applies. 28 U.S.C. § 2255(f)(3). That one-year
 15 limitation begins to run from “the date on which the right asserted was initially recognized by the
 16 Supreme Court.” Id.

17 **III. DISCUSSION**

18 The Court finds that there are no grounds to grant § 2255 relief.

19 Section 924(c), under which Mr. Avila was convicted, prohibits the use of a firearm “during
 20 and in relations to any crime of violence.” 18 U.S.C. § 924(c)(1)(A). Following the Supreme
 21 Court’s ruling in Davis, a felony qualifies as a crime of violence only if it “has as an element the
 22 use, attempted use, or threatened use of physical force against the person or property of another.”
 23 18 U.S.C. § 924(c)(3)(A); see also Davis, 139 S. Ct. 2319 (invalidating 18 U.S.C. § 924(c)(3)(B)).
 24 The Ninth Circuit has already held that federal carjacking *categorically* is a crime of violence
 25 under § 924(c)(1)(A). United States v. Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017) (per curiam);
 26 United States v. Eckford, 77 F.4th 1228 (9th Cir. 2023) (applying the reasoning from Gutierrez
 27 post-Davis to hold that Hobbs Act robbery is a crime of violence under § 924(c)(1)(A)); United
 28 States v. Buck, 23 F.4th 919 (9th Cir. 2022) (similar); United States v. Burke, 943 F.3d 1236 (9th

1 Cir. 2019) (similar). Since the federal carjacking statute categorically is a crime of violence, the
2 Court finds that Mr. Avila's claim for relief is foreclosed by binding case law.
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4 IV. CERTIFICATE OF APPEALABILITY

5 This is a final order adverse to the Petitioner Mr. Avila. As such, Rule 11(a) of the Rules
6 Governing Section 2255 Cases requires this Court to issue or deny a certificate of appealability
7 (COA). See also 28 U.S.C. § 2253(c)(1)(B). Without a COA, Mr. Avila "may not appeal that
8 denial." United States v. Washington, 653 F.3d 1057, 1059 (9th Cir. 2011). To issue a COA, the
9 Court must find that Mr. Avila "has made a substantial showing of the denial of a constitutional
10 right." 28 U.S.C. § 2253(c)(2). Under this standard, the Court looks for a showing that "reasonable
11 jurists would find [this Court's] assessment of the constitutional claims debatable or wrong." Slack
12 v. McDaniel, 529 U.S. 473, 484 (2000). Because the Court found that settled, binding caselaw
13 disposes of Mr. Avila's claims, the Court finds that no reasonable jurist could find the Court's
14 assessment debatable or wrong.

15 V. CONCLUSION

16 **IT IS THEREFORE ORDERED** that Defendant Jessy Salvador Avila's Motion to
17 Vacate, Set Aside, or Correct Sentence under 28 U.S.C. 2255 (ECF No. 38) is **DENIED**.

18 **IT IS FURTHER ORDERED** that Defendant Jessy Salvador Avila is **DENIED** a
19 Certificate of Appealability.
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21 DATED: April 22, 2024.
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24 **RICHARD F. BOULWARE, II**
25 **UNITED STATES DISTRICT JUDGE**
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